No. 98-678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Los Angeles Police Department,
Petitioner,

v.

United Reporting Publishing Corp.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY OF THE PETITIONER

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January 6, 1999

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REPLY OF THE PETITIONER

The question presented by this case is whether, under the First Amendment, the government may release official records only for specified, noncommercial purposes. Respondent collects the names and addresses of California arrestees from state law enforcement agencies and sells that information to "attorneys, insurance companies, drug and alcohol counselors, religious counselors, driving schools, and others." BIO 5. Cal. Gov't Code 6254, however, would prohibit Respondent from collecting addresses from the state for commercial purposes. The statute permits the release of address information only for "a scholarly, journalistic, political, or governmental purpose, or [for] investigation purposes by a licensed private investigator." Cal. Gov't Code 6254(f)(3). The Ninth Circuit held that Section 6254 is unconstitutional because it violates Respondent's First Amendment right to engage in commercial speech.[1]

Certiorari is warranted for several reasons. *First*, this Court's long-standing practice is to review decisions invalidating state statutes as unconstitutional. *Second*, the lower courts are divided over the question presented. Respondent acknowledges a split between the Ninth and Tenth Circuits, and also fails to distinguish persuasively two state supreme court decisions holding that the government may forbid the commercial use of accident reports. *Third*, the decision below is erroneous under this Court's precedents: Section 6254 does not restrict speech but instead is a valid exercise of the government's wide discretion in releasing government records. *Finally*, we recommend granting certiorari rather than holding this Petition pending the disposition of two other commercial speech cases.

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[1] The Ninth Circuit did not address the state law and Fourteenth Amendment arguments raised by Respondent. *See generally* BIO 10, 24 & n.14. These arguments are beyond the scope of the question presented, and Respondent did not raise any of them through a conditional cross-petition for certiorari.

CERTIORARI IS WARRANTED FOR REASONS UNRELATED TO THE MERITS OF THE RULING BELOW

1. Certiorari is warranted because the Ninth Circuit invalidated a state statute on federal constitutional grounds and this is an issue of widespread importance. Respondent fails to address this principal reason for granting certiorari. When the federal courts void a statute of a sovereign state on federal constitutional grounds, comity practically demands review in this Court. Certiorari particularly is warranted because *three* federal courts of appeals, together with several district courts, have invalidated indistinguishable state statutes based on the same rationale as the decision below. Pet. 8. The holdings of these courts apply equally to invalidate more than eighty statutes enacted by the federal government and nearly forty states. Pet. 3; Pet. App. 1a-5a. When, as here, the circuits furthermore are in conflict on the question presented, there simply is no basis for denying certiorari.

2. Certiorari is warranted because the decision below conflicts with rulings of the Tenth Circuit, the Louisiana Supreme Court, and the South Carolina Supreme Court. Respondent effectively recognizes that the lower courts are in conflict over the question presented and does not suggest that further percolation of the issue is warranted. The BIO acknowledges (at 8) the Ninth Circuit's conclusion "that the Tenth Circuit's decision in *Lanphere & Urbankiak v. Colorado*, 21 F.3d 1508 (10th Cir.), *cert. denied*, 513 U.S. 1044 (1994), is wrongly decided." *See also* BIO 10 (explaining that the Ninth Circuit "soundly criticized" *Lanphere*). The BIO also emphasizes (at 16) that the South Carolina Supreme Court's decision in *Walker* stands "in direct contradiction" to multiple decisions invalidating commercial use restrictions. Moreover, several courts and judges have recognized that the Tenth Circuit's and Louisiana Supreme Court's rulings on this question squarely conflict with decisions of the Fifth and Eleventh Circuits. *Babkes v. Satz*, 944 F. Supp. 909, 913 n.4 (S.D. Fla. 1996) (declining to follow *Lanphere* because "*Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994), is binding precedent on this Court"); *Amelkin v. Commissioner*, 936 F. Supp. 428, 429 (W.D. Ky. 1996) ("There is a conflict in the decisions of the Eleventh Circuit and the Tenth Circuit as evidenced by the decisions in *Speer v. Miller* . . . and *Lanphere* . . . ."); *Speer v. Miller*, 864 F. Supp. 1294, 1301 (N.D. Ga. 1994) (explaining that the Eleventh Circuit's decision in *Speer* "is in conflict with the Tenth Circuit's" decision in *Lanphere*); *see also Northern Ky. Chiropractic v. Ramey*, No. 95-5645, 1997 U.S. App. LEXIS 1734 (6th Cir. Jan. 29, 1997) (Nelson, J., concurring) (*Lanphere* and *DeSalvo v. Louisiana*, 624 So. 2d 897 (La. 1993), *cert. denied*, 510 U.S. 1117 (1994), conflict with *Speer* and *Innovative Database Sys. v. Morales*, 990 F.2d 217 (5th Cir. 1993)).

Only two of Respondent's arguments contest the existence of a square conflict. First, Respondent asserts that Cal. Gov't Code 6254(f)(3), which involves arrest records, "implicates the First and Sixth Amendment rights of arrestees to receive information concerning the hiring of competent legal counsel." BIO 12 n.2, 16. By contrast, the statutes at issue in *DeSalvo* and *Walker* (although not *Lanphere*) restrict the release of *accident* records. BIO 9, 16. But there is no reason to believe that the Louisiana or South Carolina Supreme Courts would reach a different result if confronted with a prohibition on the commercial use of arrest (as opposed to accident) records. Neither the decision below nor the rulings in *DeSalvo* and *Walker* rely in any way on the rights of arrestees.[2] Instead, *DeSalvo* and *Walker* rely principally on this Court's precedents granting the government wide discretion in releasing official records. Thus, the court in *Walker* did not even believe that it was necessary to conduct a First Amendment inquiry, but concluded instead that "the statute in question regulates only access to information; it in no way inhibits Walker's exercise of her free speech

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[2] Respondent relies on the district court's statement that Section 6254 "may . . . have been intended to prevent arrestees from obtaining counsel." BIO 6; Pet. App. 21a. The Ninth Circuit did not adopt this aspect of the district court's reasoning. As the Petition explains (at 6 n.2), the district court's suggestion furthermore is unfair and inaccurate: Section 6254(f)(3) applies equally to restrict the release of crime *victims*' addresses.

rights in the form of direct mail to prospective clients." 466 S.E.2d at 348 (citing *Houchins v. KQED*, 438 U.S. 1 (1978); *Zemel v. Rusk*, 381 U.S. 1 (1965)). The court in *DeSalvo* took the view that "[a] less stringent test applies . . . when the regulation does not flatly prohibit or restrict commercial speech because of its content but indirectly results in a stricture upon the flow of information or ideas." 624 So. 2d at 900. Moreover, the free speech analysis in *DeSalvo* addressed the First Amendment rights of *direct* recipients of government records, such as Respondent, who seek to sell those records for a profit. That analysis is unchanged no matter what type of record is in question and no matter who (*i.e.*, whether accident victims or arrestees) the statute affects *indirectly*.[3]

Respondent also invokes this Court's decisions in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), and *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), as signaling "the increased protection afforded commercial speech." BIO 9-10. But nothing in *44 Liquormart* or *Coors Brewing* would lead the Tenth Circuit, Louisiana Supreme Court, and South Carolina Supreme Court to revisit their holdings.[4] As we explained above, the lower courts have divided over the First Amendment's application to public records statutes. At most, such statutes impose indirect restrictions on speech. *44 Liquormart* and *Coors Brewing*, by contrast, both involved direct prohibitions on speech and neither broke substantial new ground in First Amendment jurisprudence. *44 Liquormart* invalidated a ban on advertising liquor prices except at the point of sale as "a blanket prohibition against truthful, nonmisleading speech about a lawful product." 517 U.S. at 504. *Coors Brewing Co.*

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[3] On the merits, Respondent's assertions regarding arrestee rights are erroneous. Arrestees have no greater First Amendment right than accident victims to receive information. Moreover, the Sixth Amendment right to counsel is not implicated by Respondent's sales to "insurance companies, drug and alcohol counselors, religious counselors, driving schools and others," which "use the information for many purposes, including sending free literature to arrestees offering legal, drug, and alcohol counseling." BIO 5.

[4] In point of fact, the South Carolina Supreme Court's decision in *Walker* post-dates *Coors Brewing Co.*

invalidated a federal ban on the display of alcohol content on beer labels. Both decisions applied the *Central Hudson* analysis, a point the Court made with particular force in *Coors Brewing Co.* (*see* 514 U.S. at 482 n.2), which has been settled since 1980.

CERTIORARI IS WARRANTED BECAUSE THE RULING BELOW IS ERRONEOUS

1. Section 6254 is not an invalid restriction on commercial speech. Notwithstanding the length of the BIO, Respondent never explains how Section 6254 restrains commercial speech. The statute restricts only Respondent's acquisition of arrest records. That restriction, like any other law restricting the acquisition of a product, does not trigger First Amendment scrutiny. "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). Instead, "the test for identifying commercial speech" is whether the subject of regulation "propose[s] a commercial transaction." *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989). Respondent "proposes a commercial transaction" only by advertising arrest records for sale. The Petition explained, and the BIO does not contest, that Section 6254 does not restrict Respondent's advertising.

Respondent therefore may be asserting that Section 6254 has an impermissible *indirect* effect on commercial speech. Specifically, if Section 6254 takes effect, Respondent may elect not to advertise that it has address information available for sale. In addition, Respondent's customers (including lawyers, counselors, and driving schools) may not acquire addresses from Respondent and, in turn, may not mail advertisements to arrestees. But any burden imposed by Section 6254 in this respect is minimal, and Respondent in any event lacks standing to raise the latter claim. The statute does not prevent Respondent and its customers from acquiring address information from other sources and then engaging in the identical speech. Moreover, there can be no question that California constitutionally could prohibit completely the release of

address information, thereby imposing the identical burden on the speech of Respondent and its customers.[5]

This Court already has confronted, and sustained, statutes creating such indirect burdens on speech. Specifically, the Court has concluded that restrictions on the release of government records are a matter of "legislative grace" even when they have incidental effects on speech. Pet. 14-15. Thus, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1989), held that courts may prohibit the publication of information obtained through court-ordered discovery. In *Florida Star v. BJF*, 491 U.S. 524, 534 (1989), the Court *encouraged* states to restrict access to government records as an alternative to banning speech:

> To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts. . . . *Cox Broadcasting [v. Cohn*, 420 U.S. 469, 496 (1975)] ("If there are privacy interests to be protected in judicial proceedings,

[5] Respondent's argument that "California's Legislature and its Supreme Court have rejected the police's ability to keep arrest records secret" (BIO 18 (citing *County of Los Angeles v. Superior Court*, 18 Cal. App. 4th 588, 594 (1993))) is a *non sequitur*. As the district court acknowledged, the California legislature could under the First Amendment adopt a statute prohibiting the release of arrestee addresses. Pet. App. 14a. The state court of appeals' decision in *County of Los Angeles* merely addressed as a "question of statutory construction" whether a predecessor version of Section 6254 required the disclosure of various records. 18 Cal. App. 4th at 594. The further question whether the California State Constitution requires the release of address information (*see generally* BIO 10) is neither before this Court nor relevant to the merits of the Ninth Circuit's decision.

> the States must respond by means which avoid public documentation or other exposure of private information.").

Respondent summarizes the facts of some of these cases (BIO 20-21) but fails to address at all the legal principle they embody. And, although Respondent purports to cite contrary decisions (BIO 19-20 & nn.9-10), each of those involved records of court proceedings, which (as the district court recognized) represent a unique exception based on the public's right to open trials. Pet. App. 13a n.1.

2. Section 6254 is not irrational. The principal basis for the decision below, which the BIO repeats, is that Section 6254 is "irrational" and therefore invalid. The Ninth Circuit reached this conclusion only by making two assumptions: (i) that the statute permits "journalists, academicians, curiosity seekers, and other noncommercial users [to] peruse and report on arrestee records" (Pet. App. 33a); and (ii) that "the names and addresses of the same" will be "published in any newspaper, article, or magazine in the country" (*id.* 35a). But both of those assumptions are wrong, and Respondent no longer defends them. First, Section 6254 does not permit the release of address information to "curiosity seekers" and "other noncommercial users": the statute permits disclosure only for "a scholarly, journalistic, political, or governmental purpose, or [for] investigation purposes by a licensed private investigator."[6] Second, as the Petition explained, the press frequently reports the names of arrestees, but experience teaches that they rarely publish arrestee *addresses*, which is the piece of information withheld from Respondent under Section 6254.

This case therefore is very different from *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1993). Unlike the irrational re-

[6] Respondent asserts that the statutory categories are "vague" and undefined (BIO 4), but fails to specify an particular ambiguity. None is apparent either from the statute itself or the record below. Nor does Respondent dispute that in this facial challenge, the statute must be construed to *avoid* constitutional concerns, not create them. Pet. 4-5 n.1 (citing *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990)).

striction on advertising alcohol strength at issue in *Coors Brewing*, Section 6254 represents a reasonable effort to balance competing interests under the First Amendment. The statute fulfills the public's right to know about crime by permitting the general release of the names and physical descriptions of arrestees, as well as the details of the crime. *See* Section 6254(f)(1). The statute also furthers fundamental First Amendment values by providing addresses to the press, which rarely publishes that information but instead uses it to develop facts for reporting. Section 6254 also furthers individual privacy by withholding the addresses of crime victims and arrestees except for specified, noncommercial purposes. As the Tenth Circuit explained in *Lanphere*, Respondent "would not be involved in this litigation if the information they seek is so widely available that the privacy of the accused is no longer at issue." 21 F.3d 1508, 1514, *cert. denied*, 513 U.S. 1044 (1994).

3. Section 6254 is not an unlawful content-based restriction on commercial speech. The BIO advances the alternative theory, which the Ninth Circuit did not adopt, that Section 6254 is invalid as a "content based" restriction on speech. BIO 11. Wholly apart from whether Section 6254 restricts speech at all (which we addressed above), the statute certainly is not content based. The only line drawn by the statute is between noncommercial uses of arrestee addresses (which are not permitted) and commercial users (some of which are). The statute does not draw *any* distinction based on the recipient's identity. Section 6254 thus prevents *any* person from acquiring address information except for specified noncommercial purposes. As the BIO points out (at 5), the statute applies equally to Respondent and all of its diverse clients: "attorneys, insurance companies, drug and alcohol counselors, religious counselors, driving schools, and others." The distinction drawn by Section 6254 between commercial and noncommercial users is not itself an impermissible content-based restriction because there unquestionably is a substantial difference between Respondent's use of addresses and the press's use of the same information. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 424 (1993) (commercial versus noncommercial distinction is invalid when "the distinction bears no relationship whatsoever to the particular interest that the [government] has asserted").

CERTIORARI SHOULD BE GRANTED RATHER THAN HOLDING THIS CASE

Two other pending petitions, which address the constitutionality of a federal restriction on casino gambling advertisements, relate indirectly to this case. No. 98-741, *United States v. Players Int'l* (before judgment); No. 98-387, *Greater New Orleans Broadcasting Ass'n v. United States*. The courts of appeals disagree over whether exceptions to the gambling advertising scheme render the statute irrational and therefore invalid. *Compare Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir.), *cert. denied*, 118 S. Ct. 1050 (1998) (invalid) *with Greater New Orleans Broadcasting Ass'n v. United States*, 149 F.3d 334 (5th Cir. 1998) (valid). The Ninth Circuit in this case invoked its *Valley Broadcasting* decision in holding that Section 6254 is irrational and invalid. Pet. 11-12; Pet. App. 35a.

We assume that the Court will grant certiorari to decide the gambling cases, but recommend against holding this Petition in the interim. Those cases do not address the First Amendment's application to public records statutes. In particular, the gambling cases will not resolve the conflicts created by either the Tenth Circuit's decision that a restriction on the commercial use of government records requires a relatively loose "fit" between the statute's means and ends or the South Carolina Supreme Court's decision that such restrictions do not implicate the First Amendment at all. *Lanphere*, 21 F.3d at 1515; *Walker*, 466 S.E.2d at 348. Moreover, because the gambling cases raise fact-specific challenges, it is unlikely that the Court will reformulate its recent analysis in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, in a way that substantially alters the Ninth Circuit's view of Section 6254. *See* Pet. for Cert., No. 98-741, *United States v. Players Int'l* (arguing in favor of certiorari before judgment in case with fully developed factual

record). Finally, the large number of state and federal public records statutes directly affected by the division in the lower courts (Pet. App. 1a-5a) counsels in favor of resolving this case directly rather than holding it possibly to remand for further consideration in light of the gambling cases. To the extent that this Petition relates to the gambling cases, we recommend arguing them contemporaneously.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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